

1993

# Tesco American, Inc. v. Lether : Brief of Appellant

Utah Court of Appeals

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**UTAH COURT OF APPEALS  
BRIEF**

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IN THE COURT OF APPEALS

AS TO  
DOCKET NO. 93-0762 CA

FOR THE STATE OF UTAH

TESCO AMERICAN, INC., a Utah corporation,

Plaintiff/Appellant,

vs.

RICHARD T. LETHER d/b/a  
UTAH MACHINE TOOL EXCHANGE,

Defendant/Appellee.

**93-0762-CA**

Appeal No. ~~930501~~

Priority 15

**BRIEF OF APPELLANT**

Appeal From Summary Judgment Entered By The Third Judicial  
District Court, Salt Lake County, State of Utah  
Honorable David S. Young  
Third District Court Judge

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**IN THE COURT OF APPEALS**  
**FOR THE STATE OF UTAH**

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TESCO AMERICAN, INC., a Utah corporation,	)	
	)	
Plaintiff/Appellant,	)	
	)	
vs.	)	Appeal No. 930501
	)	
RICHARD T. LETHER d/b/a	)	
UTAH MACHINE TOOL EXCHANGE,	)	Priority 15
	)	
Defendant/Appellee.	)	

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**IN THE UTAH COURT OF APPEALS**

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RICHARD T. LETHER, d/b/a	)	Priority 15
UTAH MACHINE TOOL EXCHANGE,	)	
	)	
Defendant/Appellee.	)	

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**BRIEF OF APPELLANT**

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**STATEMENT OF JURISDICTION**

Jurisdiction over this appeal was originally in the Utah Supreme Court pursuant to UTAH CODE ANN. § 78-2-2(3)(j). This appeal was poured over to the Court of Appeals on November 26, 1993, thus empowering this court to decide this matter under UTAH CODE ANN. § 78-2a-3(2)(k).

**ISSUES PRESENTED AND STANDARD OF REVIEW**

**Issue:** Whether the trial court erred in applying UTAH CODE ANN. § 70A-3-607 to the undisputed facts of this matter in determining whether there was an accord and satisfaction between the parties.

**Standard of Review:** Correction of error. *Baldwin v. Burton*, 850 P.2d 1188, 1192 (Utah 1993).

## **DETERMINATIVE STATUTES**

The following statutes are dispositive of this appeal:

1. UTAH CODE ANN. § 70A-3-607 provides in full as follows:

The negotiation of an instrument marked "paid in full," "payment in full," "full payment of a claim," or words of similar meaning, or the negotiation of an instrument accompanied by a statement containing such words or words of similar meaning, does not establish an accord and satisfaction which binds the payee or prevents the collection of any remaining amount owed upon the underlying obligation, unless the payee personally, or by an officer or employee with actual authority to settle claims, agrees in writing to accept the amount stated in the instrument as full payment of the obligation.

2. UTAH CODE ANN. § 70A-2-711 provides in full as follows:

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 70A-2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

(a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

(b) recover damages for nondelivery as provided in this chapter (Section 70A-2-713).

(2) Where the seller fails to deliver or repudiates the buyer may also

(a) if the goods have been identified recover them as provided in this chapter (Section 70A-2-502); or

(b) in a proper case obtain specific performance or replevy the goods as provided in this chapter (Section 70A-2-716).

(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their

inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (Section 70A-2-706).

3. UTAH CODE ANN. § 70A-2-713 provides in full as follows:

(1) Subject to the provisions of this chapter with respect to proof of market price (Section 70A-2-723), the measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this chapter (Section 70A-2-715), but less expenses saved in consequence of the seller's breach.

(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

### **STATEMENT OF THE CASE**

**Nature of the Case:** This is an action by plaintiff/appellant Tesco American, Inc. ("Tesco") for damages as a result of a breach of contract by defendant/appellee Utah Machine Tool Exchange ("Utah Machine") when Utah Machine failed to deliver machinery. Tesco paid the full purchase price, but instead of delivering the machinery to Tesco as agreed, Utah Machine attempted to sell it for a higher price to another buyer. Tesco first brought an action for breach and nondelivery and later amended the complaint to plead a claim for conversion.

**Course of Proceedings and Disposition Below:** The complaint was filed originally in the Third Circuit Court for Salt Lake County, State of Utah (Civil No. 92 001 2987 CV) on September 14, 1992, stating claims for breach of contract and nondelivery of goods. Later, Tesco discovered that Utah Machine had in fact obtained the purchased items, but was trying to sell them at a higher price to another buyer. Tesco filed an amended complaint on December 29, 1992, adding a claim for conversion. This matter was transferred to the district court on May 24, 1993, after it was determined that Tesco's damages would exceed the circuit court's jurisdictional limit.



On March 18, 1993, Utah Machine filed a motion for summary judgment. The district court granted that motion on June 25, 1993, and judgment was entered on July 13, 1993. The parties stipulated to a dismissal of Utah Machine's counterclaim, and the counterclaim was dismissed on September 10, 1993. Tesco filed its notice of appeal on October 5, 1993. The appeal was poured over to the Court of Appeals on November 26, 1993.

### **STATEMENT OF FACTS**

Tesco and Utah Machine entered into a contract on May 27, 1992, whereby Tesco purchased certain used machinery for Tesco's business. The machinery consisted of a punch, sheer, and associated tools and parts. The machinery was purchased on an "as is" basis, F.O.B. Florida. (R. 00128). Tesco paid the full purchase price of \$15,000 that same day. (R. 00128, 00178). The purchase invoice stated that title to the machinery passed upon payment of the full price. (R. 00128). Utah Machine failed to deliver the machinery as agreed, claiming that it could not obtain delivery from its supplier. After Utah Machine failed to deliver the machinery, Tesco filed this action on September 15, 1993. By at least October 26, 1992, Utah Machine obtained possession of the machinery, but did not notify Tesco. (R. 00052).

Upon learning that Utah Machine had received the machinery, Tesco sought and was granted a pre-judgment writ of replevin by the circuit court. (R. 00132) On October 26, 1992, Utah Machine attempted to sell the machine to a third person for \$19,900, despite having already received full payment from Tesco. (R. 00155-156). Prior to Utah Machine's attempts to sell the machinery, however, Tesco made repeated demands that Utah Machine deliver the machinery to Tesco. (R. 00052). The pre-judgment writ of replevin was

dissolved by the circuit court on November 23, 1992. (R. 00130). Tesco subsequently amended its complaint to include a cause of action for conversion. (R. 00122).

After it became clear that Utah Machine would not deliver the machinery, Tesco began searching for comparable used machinery. Tesco could not find a suitable used substitute, but was able to locate comparable new machinery at a cost of \$45,000. (R. 00034). As a result of the increase in damages for nondelivery of the machinery, Tesco transferred the case to the district court. (R. 00013-16, 00005, 00034).

Utah Machine paid back the purchase price on October 30, 1992. (R. 00099). Utah Machine wrote on the back of the check "payment in full" and referred to the original invoice. (R. 00100). Tesco negotiated the check, but did not release Utah Machine from the original agreement or from Tesco's claims under that agreement. (R. 00034-35). The parties did not enter into a subsequent written agreement discharging Utah Machine's obligations under the original agreement to deliver the machinery. (R. 00034-35).

### **SUMMARY OF ARGUMENT**

Fundamental to the recovery of damages for breach of contract is the notion that the nonbreaching party is entitled to the benefit of the bargain. In this case, Tesco bargained and paid for certain machinery. Utah Machine decided not to deliver the machinery and attempted instead to sell it for a higher price. Under article II of the Uniform Commercial Code, Tesco's damages are the difference between the contract price and the market price, after recovery of the purchase price. The trial court erred when it concluded that Tesco's acceptance of that purchase price constituted an accord and satisfaction between the parties when there was no independent writing discharging Utah Machine's underlying obligation as required by UTAH CODE ANN. § 70A-3-607.

## ARGUMENT

### **THE TRIAL COURT ERRED IN ITS INTERPRETATION AND APPLICATION OF UTAH CODE ANN. § 70A-3-607 AND THE REMEDY PROVISIONS OF THE COMMERCIAL CODE IN CONCLUDING THAT TESCO AND UTAH MACHINE HAD REACHED AN ACCORD AND SATISFACTION THEREBY BARRING ANY REMEDIES FOR THE NONDELIVERY OF GOODS UNDER THE PURCHASE AGREEMENT BETWEEN THE PARTIES**

When the language of a statute is clear, a court will not "look beyond the language's plain meaning to divine legislative intent." *Horton v. Royal Order of the Sun*, 821 P.2d 1167, 1168 (Utah 1981). In *Ferro v. Utah Dept. of Commerce*, 828 P.2d 507, 514 (Utah App. 1992), the court said: "When language is clear and unambiguous, it must be held to mean what it expresses, and no room is left for construction." Likewise, in *West Jordan v. Morrison*, 656 P.2d 445, 446 (Utah 1982), the court noted that "a statute should be applied according to its literal wording unless it is unreasonably confused or inoperable."

The Uniform Commercial Code governs this action because it is a transaction for the sale of goods. UTAH CODE ANN. § 70A-20-102. Specifically, Tesco's second claim for relief for nondelivery of goods is governed by UTAH CODE ANN. §§ 70A-2-711 and 2-713. Utah Machine's defense of accord and satisfaction, because it is based on the negotiation of a check, is governed by UTAH CODE ANN. § 70A-3-607.

#### ***A. The Court Failed To Apply UTAH CODE ANN. § 70A-3-607 According To Its Plain Meaning***

Whether an accord and satisfaction exists is determined by the Uniform Commercial Code as follows:

The negotiation of an instrument marked "paid in full," "payment in full," "full payment of a claim," or words of similar meaning, or the negotiation of an instrument accompanied by a statement containing such words or words of similar meaning, does not establish an accord and satisfaction which binds the payee or prevents the collection of any remaining amount owed upon the underlying obligation, unless the payee personally, or

by an officer or employee with actual authority to settle claims, agrees in writing to accept the amount stated in the instrument as full payment of the obligation.

UTAH CODE ANN. § 70A-3-607. The terms of the statute could hardly be clearer. Section 3-607 provides without any qualification that, as a matter of law, there is no accord and satisfaction as to an underlying obligation unless there is an agreement in writing to that effect.

Utah Machine argued below that certain pre-section 3-607 decisions governed the issue of accord and satisfaction, and the trial court seemed persuaded that Tesco's negotiation of the check from Utah Machine marked "payment in full" constituted an accord and satisfaction despite the clear terms of § 3-607. Applied to the undisputed facts of this case, however, that section clearly protects Tesco's negotiation of the check and requires a new agreement, in writing, between the parties.<sup>1</sup>

Under the plain language of § 3-607, negotiating a check with a restrictive endorsement does not effect an accord and satisfaction. A separate written agreement is required. Therefore, Utah Machine's check marked payment in full cannot by itself constitute the writing contemplated by § 3-607. Without a writing expressing the intent of the parties to settle and discharge an underlying obligation, there can be no accord and satisfaction.

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<sup>1</sup> Several cases decided prior to the enactment of § 3-607 aid the court in determining the contents of the writing contemplated by § 3-607. For example, *Spor v. Crested Butte Silver Mining, Inc.*, 740 P.2d 1304, 1308 (Utah 1987), held that an accord and satisfaction requires "an offer and acceptance and a meeting of the minds." See also *Bennion v. LeGrande Johnson Construction Co.*, 701 P.2d 1078, 1082 (Utah 1985) (accord and satisfaction require that the parties to a contract "mutually agree that a different performance than that required by the original contract will be made in substitution of the performance originally agreed upon. . . ." Utah Machine relied on *Estate Landscape v. Mountain States Telephone*, 844 P.2d 322 (Utah 1992) as authority for the argument that cashing a check marked payment in full is an accord and satisfaction. Although it is not clear whether the trial court relied on that case, it is clear that the court was adjudicating facts that pre-dated the 1990 enactment of § 70A-3-607. See L. 1990, Ch. 312 §1, effective April 23, 1990. *Estate Landscaping* and other decisions, such as *Morton Remodeling v. Jensen*, 706 P.2d 607 (Utah 1985), relied on in *Estate Landscaping*, were based on claims that arose prior to the enactment of subsection (2) of 1-207 and all of § 3-607.

***B. The Trial Court Erred In Its Application Of The Remedy Provisions of UTAH CODE ANN. § 70A-2-711 and 2-713 To The Undisputed Facts Of This Matter***

The remedies provided by the commercial code "shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed." UTAH CODE ANN. §70A-1-106. A buyer damaged by a seller's failure to deliver goods under a contract is always entitled to recover the purchase price. That portion of the damages for nondelivery is only a threshold to the recovery authorized by the Uniform Commercial Code.

A buyer denied the benefit of the bargain may elect one of two remedies as follows:

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 70A-2-612), the buyer may cancel and whether or not he has done so may *in addition to recovering so much of the price as has been paid*

(a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

(b) recover damages for nondelivery as provided in this chapter (Section 70A-2-713).

UTAH CODE ANN. § 70A-2-711 (Emphasis added).

Damages for nondelivery are determined as follows:

(1) Subject to the provisions of this chapter with respect to proof of market price (Section 70A-2-723), the measure of damages for nondelivery or repudiation by the seller *is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages* provided in this chapter (Section 70A-2-715), but less expenses saved in consequence of the seller's breach.

(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

UTAH CODE ANN. § 70A-2-713 (Emphasis added).

The trial court refused to apply these provisions to the undisputed facts of this action. (R. 00216). The court ruled instead that Tesco was not entitled to damages measured by the benefit of the bargain and that a return of the purchase price was alone sufficient and was an accord and satisfaction. (R. 00218).<sup>2</sup> The trial court did not consider the damages provisions of the Utah Commercial Code available when a seller fails to deliver goods under an agreement. In this case, it was undisputed that Tesco had to seek a replacement machine on the open market. The only comparable machine was a new one, with a price of \$45,000. (R. at 00034.) The difference between the contract price at the time of the breach and the market price constitutes the measure of damages, along with incidental and consequential damages. UTAH CODE ANN. § 70A-2-713.

The remedy provisions of the commercial code protect an aggrieved buyer's expectations and are designed to put the buyer as far as possible in the same position it would have enjoyed had the seller performed. *See* UTAH CODE ANN. § 70A-1-106; WHITE & SUMMERS § 6-4, at 222 ("[p]resumably, the typical aggrieved buyer will persist in his desire to own the goods that he did not acquire from the breaching seller. . . .")

Thus, recovery of the purchase price merely begins rather than ends the calculation of damages and cannot constitute an accord and satisfaction without a written agreement discharging the underlying obligation. In *Palmer v. Idaho Peterbuilt, Inc.*, 641 P.2d 346 (Idaho App. 1982), for example, the seller argued that the buyer's acceptance of a purchase price refund "should have been the end of the matter." *Id.* at 347. The court recognized, however, that a refund of the purchase price marked only the beginning of the available remedies: "By accepting the refund in this case, the buyer simply received so much of the price as he had paid. He was still entitled to his additional remedies under section [28-2-711

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<sup>2</sup> *See* 3 HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-713, at 364 (1982); J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 6-4, at 222 (2d ed. 1980) (illustrating the benefit of the bargain concept).

of Idaho's commercial code]." *Id.* at 348. *See also Welken v. Conley*, 252 N.W.2d 311, 21 U.C.C. Rep. Serv. 1304, 1308 (N.D. 1977); *Jon-T Farms, Inc. v. Goodpasture, Inc.*, 21 U.C.C. Rep. Serv. 1309, 1318 (Tex. App. 1977) (aggrieved buyer is "free to choose between damages based upon the difference between the contract price and the cost of cover under § 2-712, and damages for nondelivery, consisting of the difference between the market price at the time when the buyer learns of the breach and the contract price under § 2-713(a)").

In this case, the trial court seems to have overlooked the fact that Utah Machine obtained possession of the goods, but still refused to deliver them to Tesco despite Tesco's having paid the full purchase price (title to the goods had already passed to Tesco pursuant to the terms of the purchase invoice, hence the claim for conversion (R. 00128)).<sup>3</sup> Through a writ of replevin, Tesco removed the goods from Utah Machine, only to have the writ dissolved. (R. at 00180.)<sup>4</sup> However, Utah Machine then tried to sell the goods for \$19,900 (R. 00052-53), apparently hoping to turn a quick profit before returning the purchase price to Tesco. Tesco's need for the machinery did not end with a return of the purchase price, however. Tesco was forced through no fault of its own to shop for substitute machinery. (R. 00034).

Utah Machine was not entitled to be rescued from what the trial court called "a bad deal" (R. 00213), especially when it could have performed under the agreement by simply delivering the machinery as promised. Tesco obviously needed the items it had purchased and went so far as to secure a court-ordered replevin. Having cashed a check for a return of

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<sup>3</sup> Utah Machine originally argued that it was free to sell the machinery to another buyer because Tesco had rescinded the contract. (R. 00066). Realizing that UTAH CODE ANN. § 70A-2-720 allows an aggrieved party to both cancel a contract and recover damages for its breach, Utah Machine abandoned that position altogether. (R. 00207, 00212). Indeed, Utah Machine did not even file a reply memorandum in support of its motion for summary judgment. (R. 00173).

<sup>4</sup> Replevin or specific performance is also one of the remedies available to an aggrieved buyer. UTAH CODE ANN. § 70A-2-711(2)(b).

the purchase price, however, Tesco merely recovered, as was its right, "so much of the price as [had] been paid. . . ." UTAH CODE ANN. § 70A-2-711.

In other words, Tesco could have recovered the price through litigation under § 2-711. Recovery of the funds without the aid of a judgment does not mean that Tesco was made whole. Without a writing setting forth an accord and satisfaction discharging the "underlying obligation," cashing the check was only the first step in the remedy for breach. *Id.*; UTAH CODE ANN. § 70A-3-607. *See, e.g., Productora E Importadore De Papel, S.A. DeC.V. v. Fleming*, 25 U.C.C. Rep. Serv. 729, 735 (Mass. 1978); *Parker v. Rod Johnson Farm Service, Inc.*, 384 N.E.2d 1129, 25 U.C.C. Rep. Serv. 1263 (Ind. App. 1979).

The trial court's grant of summary judgment was based on a two-fold error. The court first misinterpreted § 3-607 and then seemed to not even consider the remedy provisions of the commercial code. (R. 00213-215). By limiting Tesco to a return of the purchase price, a remedy to which it is entitled as a matter of law under § 2-711, the trial court blocked Tesco from realizing the benefit of the contract breached by Utah Machine. The principle of the benefit of the bargain guides all of the remedy provisions of article II of the commercial code. UTAH CODE ANN. § 70A-1-106.<sup>5</sup>

## CONCLUSION

The trial court's grant of summary judgment in favor of Utah Machine must be reversed. By accepting the purchase price, Tesco did no more than exercise its rights as expressly allowed under UTAH CODE ANN. § 70A-2-711. There was no written agreement that constituted an accord and satisfaction as defined in UTAH CODE ANN. § 70A-3-607.

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<sup>5</sup> The trial court replaced the rather mechanical application of §§ 2-711 and 2-713, as well as § 3-607, with a qualitatively different standard, one that imposes a "duty of care" on the aggrieved buyer. (R. 00214-215). The only duty imposed on the buyer is that of mitigating its damages. In this case, it was undisputed that Tesco began searching for replacement machinery, first on the used market. When that was unsuccessful, Tesco was forced to look to new machinery to meet its needs. During the interim, Tesco was forced to contract out work it could have performed in-house. (R. 00034).



Tesco is entitled to the benefit of its bargain. Accordingly, this court should reverse the trial court's entry of summary judgment and enter judgment in favor of Tesco in the amount of \$30,000, or remand the case for a trial on the issue of damages only.

**DATED** this 23<sup>rd</sup> day of December, 1993.

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By 

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**CERTIFICATE OF SERVICE**

I hereby certify that I mailed two true and correct copies of the foregoing **BRIEF OF APPELLANT** to the following, postage prepaid, this 23 day of December, 1993:


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**FILED**  
Utah Court of Appeals

DEC 29 1993

IN THE COURT OF APPEALS  
FOR THE STATE OF UTAH

  
Mary T. Noonan  
Clerk of the Court

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TESCO AMERICAN, INC., a Utah corporation, )

Plaintiff/Appellant, )

vs. )

RICHARD T. LETHER d/b/a )  
UTAH MACHINE TOOL EXCHANGE, )

Defendant/Appellee. )

Appeal No. 930762-CA

Priority 15

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**ADDENDUM TO  
BRIEF OF APPELLANT**


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Pursuant to the court's request of December 28, 1993, appellant respectfully submits this addendum to its appellate brief.

**DATED** this 29th day of December, 1993.

**KRUSE, LANDA & MAYCOCK**  
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Salt Lake City, Utah 84101-2034

By

  
**ELLEN MAYCOCK**  
**DAVID C. WRIGHT**

Attorneys for Plaintiff/Appellant

### **ADDENDUM INDEX**

1. Utah Machine Tool Exchange Invoice No. 6046, date received 5/27/92.
2. Findings of Fact and Conclusions of Law dated July 13, 1993.
3. Judgment dated July 13, 1993.

Tab 1



# UTAH MACHINE TOOL EXCHANGE

#83 South Navajo Street (1350 West)  
Salt Lake City, Utah 84104-1819  
Phone: 801-328-0508  
FAX: 801-328-0613

Offer to sell and acceptance stated  
on back of this invoice.

**INVOICE**

6046

**Bill To:**

TESCO WILLIAMSEN

1925 Indiana Ave.

Salt Lake City, Utah 84104

**Ship To:**

SAME

DATE RECEIVED	CUST. P.O.			
5-27-92				
DATE SHIPPED	B/L NO.	SHIP VIA		
QUANTITY	SERIAL NO.	GENERAL DESCRIPTION	UNIT PRICE	PRICE
1 LOT		USED PUNCH, SHEAR, TOOLS, PARTS AS INSPECTED, AS IS FOB FLORIDA  SHIP FREIGHT COLLECT 10' OF DECK SPACE @ 8000#	NO TAX #B19791	\$15,000
TITLE DOES NOT PASS UNTIL TOTAL PRICE IS PAID IN FULL			<b>TOTAL DUE ♦ \$15,000</b> PAID	

It is the user's responsibility to provide proper safety devices and equipment or means that may be necessary to safeguard the operator from harm for any particular use, operating, or set up and to adequately safeguard the above machine or machines to meet O.S.H.A. safety standards. User shall use and require his employees to use all safety devices, guards and proper safe operating procedures as set forth in manual and instruction sheets from the manufacturer. User shall not remove any such device or guard or warning sign. If user fails to comply, he agrees to indemnify and save seller harmless from any liability incurred to persons injured directly or indirectly in connection with the operation

*Richard Letten*

Tab 2

Francis J. Nielson 2411  
ARNOVITZ, SMITH & NIELSON  
Attorney for Defendant  
110 South Main Street, Suite 1305  
Salt Lake City, Utah 84101  
Telephone: (801) 322-0524  
15092

**IN THE THIRD CIRCUIT COURT FOR THE STATE OF UTAH**  
**SALT LAKE COUNTY, SALT LAKE CITY DEPARTMENT**

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TESCO AMERICAN, INC.,	:	
A Utah Corporation,	:	<b>FINDINGS OF FACT AND</b>
	:	<b>CONCLUSIONS OF LAW AND</b>
Plaintiff,	:	
	:	
vs.	:	
	:	
RICHARD T. LETHER, dba	:	Civil No. 930902937
UTAH MACHINE TOOL EXCHANGE,	:	
	:	Judge David S. Young
Defendant.	:	

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This cause having come on to be heard on Motion of defendant for summary judgment pursuant to Utah R. Civ. P. 56 on the 25th day of June, 1993, at the hour of 9:30 a.m., the Honorable David S. Young, Judge presiding; Francis J. Nielson having appeared for the defendant and David C. Wright having appeared for the plaintiff, and the Court having considered the defendant's Memorandum of Points and Authorities and Richard T. Lether's Affidavit in support of the Motion, and plaintiff's Memorandum, together with the Affidavit of William S. Brugger in opposition to the Motion, and having heard oral argument, and having found there is no genuine of fact, with respect to plaintiff's claims against defendant, to be

submitted to the trial court, and good cause appearing, therefore, now makes and enters the following:

**FINDINGS OF FACT**

1. On May 27, 1992, Richard T. Lether, dba Utah Machine Tool Exchange (Richard) purchased certain equipment from Calissi Properties, Inc. (Calissi) for resale to the plaintiff, Tesco American, Inc. (Tesco).
2. On May 27, 1992, Richard sold the equipment to Tesco for \$15,000.00.
3. Tesco paid Richard \$15,000.00 for the equipment with his check number 011338, dated May 27, 1992.
4. Richard paid Calissi \$12,750.00 for the equipment with his check number 9533, dated May 27, 1992.
5. Richard purchased the equipment from Calissi with the understanding it would be shipped upon receipt of payment in full.
6. Calissi failed to perform as agreed in that it did not ship the equipment upon receipt of payment in full from Richard.
7. Richard, through counsel and the Economic Crime Unit of the Attorney's General's Office of the State of Florida, pressed Calissi to perform without success.
8. On August 21, 1992, James R. Kruse of the law firm of Kruse, Landa and Maycock demanded of Richard formally to repay the amount of \$15,000.00 to Tesco, plus



interest at the rate of ten percent (10%) per annum from May 27, 1992, to the date of the payment, together with \$200.00 in attorney's fees, and for costs incurred in connection with asserting the demand.

9. James R. Kruse sent another communication to Richard on August 24, 1992, reiterating Tesco's demand to refund the \$15,000.00, plus interest, attorney's fees and reimbursement of \$622.00 in air fare for the representative of Tesco to travel to Florida to inspect the machine that Richard had agreed to sell to Tesco.

10. On September 11, 1992, Richard's attorney, Irene Warr, wrote to Ellen Maycock suggesting a method by which the \$15,000.00 could be refunded if Richard could not secure the machine from Calissi.

11. On September 16, 1992, Tesco's attorney, Ellen Maycock, wrote to Richard's attorney, Irene Warr, outlining a method by which Richard could refund the \$15,000.00, plus interest, attorney's fees, costs and air fare incurred by Tesco to inspect the machine.

12. On or about September 15, 1992, Tesco filed suit against Richard.

13. On or about October 15, 1992, Ray Ciarci of Calissi advised Richard that the equipment was available and Richard arranged for the machine to be shipped to Salt Lake City.

14. On or about October 27, 1992, Tesco secured an Order for a Pre-Judgment Writ of Replevin and took the equipment into its possession.

15. On or about November 24, 1992, the court entered an order requiring Tesco to return the equipment to Richard.

16. At the hearing on Tesco's Order to Show Cause why its Order for Pre-Judgment Writ of Replevin should not be continued in effect during the pendency of the action, Richard stated in open court that he would be willing to refund the \$15,000.00 immediately.

17. Tesco, through its counsel, Ellen Maycock, instructed Richard to deliver the \$15,000.00 check to her office.

18. Richard paid the \$15,000.00 with his check number 9825, dated October 30, 1992.

19. Richard wrote "payment in full repayment on #6046 per court."

20. Tesco's president, William S. Brugger, endorsed the check and deposited it.

21. After having deposited the check with the restrictive endorsement, Tesco continued with its lawsuit and filed its First Amended Complaint seeking an award of compensatory damages of \$15,000.00, for an award of incidental and consequential damages in an amount to be proven at trial, its attorney's fees and costs incurred in the prosecution of the

action, and for an award of exemplary and punitive damages in an amount to be determined at trial.

From the foregoing Findings of Fact, the Court now makes and enters the following:

### **CONCLUSIONS OF LAW**

1. There are no genuine issues of fact relating to the defense of accord and satisfaction to be submitted to the trial court.

2. The Court has reviewed the facts in the light most favorable to Tesco, the non-moving party.

3. Tesco's subjective intentions reflected in its claims that it cashed the \$15,000.00 check from Richard with the understanding that it constituted a return of its purchase money only, that it did not intend to release Richard from any claims and that the parties did not enter into any agreement, written or otherwise, to the effect that the return of the purchase price was an accord and satisfaction between them, are irrelevant.

4. Tesco's conduct reflected in the demand letters to Richard for reimbursement of the \$15,000.00, the discussions in open court in which Richard agreed to refund the entire \$15,000.00 purchase price and the endorsement of the \$15,000.00 check by Tesco's president, William S. Brugger, is conclusive proof of acceptance of the accord and satisfaction by Tesco.

Civil No. 930902937  
Judge David S. Young

5. Richard has established the defense of accord and satisfaction by demonstrating that there was a bona fide dispute over an unliquidated amount, that a payment was tendered by Richard in full settlement of the entire dispute, and that Tesco accepted the payment.

6. Richard is entitled to summary judgment dismissing Tesco's First Amended Complaint against him with prejudice.

6. Richard is not entitled to summary judgment on his Counterclaim because there is a disputed issue of fact as to whether a press brake attachment was returned with the rest of the machine.

DATED this 13th day of July, 1993.

/s/  
\_\_\_\_\_  
DAVID S. YOUNG  
Third District Court Judge

Civil No. 930902937  
Judge David S. Young

**CERTIFICATE OF MAILING**

I hereby certify that on the 2nd day of July, 1993, I mailed, postage prepaid, a true and correct copy of the foregoing Findings of Fact and Conclusions of Law and Judgment to the following:

David C. Wright  
KRUSE, LANDA & MAYCOCK  
Attorney for Plaintiff  
50 West Broadway, Eighth Floor  
Salt Lake City, Utah 84101

A handwritten signature in cursive script, reading "David C. Wright", is written over a horizontal line.

Tab 3

FILED 1993 JUL 13 10 00 AM  
THIRD JUDICIAL DISTRICT

JUL 13 1993

SALT LAKE COUNTY

By \_\_\_\_\_ Deputy Clerk

Francis J. Nielson 2411  
ARNOVITZ, SMITH & NIELSON  
Attorney for Defendant  
310 South Main Street, Suite 1305  
Salt Lake City, Utah 84101  
Telephone: (801) 322-0524  
45092

*District*  
IN THE THIRD ~~CIRCUIT~~ COURT FOR THE STATE OF UTAH  
SALT LAKE COUNTY, SALT LAKE CITY DEPARTMENT

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TESCO AMERICAN, INC.,	:	
A Utah Corporation,	:	
	:	<b>JUDGMENT</b>
Plaintiff,	:	
	:	
vs.	:	
	:	
RICHARD T. LETHER, dba	:	Civil No. 930902937
UTAH MACHINE TOOL EXCHANGE,	:	
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Civil No. 930902937  
Judge David S. Young

submitted to the trial court, and the Court having made and entered its Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The defendant's Motion for Summary Judgment on plaintiff's claims against defendant is granted.
2. Plaintiff's First Amended Complaint against defendant is hereby dismissed with prejudice.
3. The defendant's Motion for Summary Judgment on its Counterclaim against the plaintiff is denied.

DATED this 13 day of July, 1993.

1st DAVID S. Young  
DAVID S. YOUNG  
Third District Court Judge



**CERTIFICATE OF SERVICE**

I hereby certify that I mailed two true and correct copies of the foregoing **ADDENDUM TO BRIEF OF APPELLANT** to the following, postage prepaid, this 29th day of December, 1993:

Francis J. Nielson, Esq.  
Arnovitz, Smith & Nielson  
310 South Main Street, Suite 1305  
Salt Lake City, Utah 84101

  
\_\_\_\_\_  
**DAVID C. WRIGHT**